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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

June 25, 1993

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

[1] Special Report: Suit Against EPA Seeks to Nullify ETS Risk Assessment

A group of tobacco-related organizations sued the EPA on June 22, 1993, seeking a judgment requiring EPA to withdraw both its classification of ETS as a Group A carcinogen and the Risk Assessment on which that classification was based. In four counts, plaintiffs' complaint charges EPA with (i) exceeding its statutory authority in conducting the risk assessment; (ii) using faulty science and improper scientific procedures to arrive at its conclusions; (iii) failing to follow its own risk-assessment guidelines; and (iv) violating the guarantee of due process of law in the Fifth Amendment to the U.S. Constitution.

The six plaintiffs in the suit are the Flue-Cured Tobacco Cooperative Stabilization Corporation; The Council for Burley Tobacco, Inc.; the Universal Leaf Tobacco Company, Incorporated; Philip Morris Incorporated; R.J. Reynolds Tobacco Company; and Gallins Vending Company. The case was filed in the U.S. District Court for the Middle District of North Carolina. *Flue-Cured Tobacco Cooperative Stabilization Corporation, et al., v. EPA*, No. 6:93CV370 (U.S. District Court, Middle District, North Carolina) (filed June 22, 1993).

Appendix B contains a copy of the plaintiffs' complaint, and Appendix C contains a copy of an article about the case from *The Washington Post*.

On the subject of authority, plaintiffs' complaint alleges that EPA never had authority to classify ETS under its carcinogen-classification guidelines and that, in any event, EPA failed to follow the requirements of the Radon Gas and Indoor Air Quality Research Act, 42 U.S.C. § 7401, note. That is the statute on which EPA relied in conducting the risk assessment.

When the risk assessment was released on January 7, 1993, EPA Administrator William Reilly acknowledged that his agency did not have authority to regulate indoor air quality or environmental tobacco smoke. Nevertheless, Reilly made it clear that EPA intended that the risk assessment have a regulatory impact when he expressed the hope that "no further action by any government agency will be necessary to create a smoke-free office environment" other than the EPA classification of ETS as a Group A carcinogen.

On the subject of science, plaintiffs allege that EPA's designation of ETS as a Group A carcinogen was arbitrary and capricious, principally because the classification is not supported by ETS epidemiology and is not justified by EPA's attempts to use mainstream smoke as a surrogate for ETS. "EPA was able to reach its conclusion only by manipulating and 'cherry-picking' data, ignoring critical statistical studies and chemical analyses, failing to account for confounding factors and sources of bias, violating basic statistical principles designed to minimize the possibility that an apparent association is due to chance," and using scientific assumptions and methodologies not generally accepted by the scientific community or even the agency itself in other risk assessments it has conducted, the complaint alleges.

"The single most egregious abuse was the EPA's steadfast refusal to incorporate the results of the two most recent studies of ETS into their risk assessment calculations. EPA and many others in the scientific community know exactly what those studies would do if incorporated: negate the EPA findings," said Steve Parrish, Senior Vice President and General Counsel for Philip Morris Inc. Parrish, along with representatives of the other plaintiffs in the case, announced the filing of the complaint on June 22, 1993.

Responding to the plaintiffs' complaint, current EPA Administrator Carol Browner issued this statement:

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"The agency's view is that secondhand tobacco smoke can cause cancer. This assessment is based on scientific evidence that has been thoroughly peer-reviewed and we stand by it." Browner became EPA's administrator after the risk assessment had been released.

The judge assigned to the case via the court's assignment system is the Honorable William Lindsay Osteen, Sr., age 62. Judge Osteen was appointed to the bench in 1991 by President Bush. Before that, he practiced law in North Carolina for approximately 35 years. He was the United States Attorney for the Middle District of North Carolina from 1969 to 1974.

For a summary of the contents and release of the ETS risk assessment, *see* issue 38 of this Report, January 7, 1993.

[2] EPA Fails to Replicate Anderson Carpet Study Results

According to press reports, the EPA has been unable to replicate studies of carpet off-gassing which allegedly produced respiratory and neurologic symptoms and death in mice exposed to warmed carpet samples in the Anderson Laboratories. Although the agency did apparently produce similar effects in the Anderson Laboratories, tests conducted in its own labs could not reproduce the test findings. For a discussion of the Anderson Laboratories experiments, *see* issue 46 of this Report, April 30, 1993.

A researcher at the University of Pittsburgh, asked by the carpet and rug manufacturers' trade association to address the Anderson Laboratories' findings, has reportedly produced similar results using Anderson's research methods and equipment. Both he and the EPA have cautioned that additional research must be conducted.

The House Government Operations Subcommittee on Environment, Energy and Natural Resources met on June 11, 1993, to consider testimony by Rosalind Anderson, representatives of the carpet industry, EPA and the Consumer Product Safety Commission (CPSC). Anderson's testing methods were challenged by the executive director of the Carpet and Rug Institute (CRI), who said a scientific advisory board studying the Anderson protocols found them to be "tantamount to lacing up a human being in a straitjacket and repeatedly choking him for two days." The CRI announced that carpet manufacturers intend to develop a new consumer information label for their products that would be aimed at chemically sensitive consumers.

EPA and CPSC were reportedly criticized by subcommittee members for not acting quickly enough to address the issue. The agencies apparently defended themselves by noting how difficult it is under procedures mandated by Congress to set standards that can be successfully defended in court.

According to a New York assistant attorney general, who also testified at the hearing, attorneys general from four states are considering initiating a law suit or filing a citizens' petition under the Toxic Substances Control Act to spur the EPA into regulatory action. They say there is concern that the current "green label" program developed by the industry is misleading to consumers in that carpets with chemicals at concentrations allegedly linked to illness are being sold with green labels attached.

At the conclusion of the hearing, EPA and CPSC reportedly agreed to (i) provide information about the chemical composition of carpets; (ii) hold a workshop to address conflicting scientific data; (iii) design a multi-million dollar indoor air research program to evaluate chemical toxicity and measure worker exposure to carpet chemicals; and (iv) develop "consumer information labels and posters" to notify sensitive individuals of potential chemical exposure from carpet emissions. *See BNA National Environment Daily*, June 15, 1993; *Chicago Tribune*, June 12, 1993; *Greenwire*, *The Hartford Courant*, *The Orlando Sentinel*, and *PR Newswire* June 11, 1993; *Associated Press* and *United Press International*, June 10, 1993.

➤ Anderson study called "Junk Science," item 30.

U.S. Department of Health and Human Services (HHS)

[3] HHS Revises Draft Executive Order on Smoking

According to a press report, HHS has revised a draft executive order which would ban smoking in most federal executive branch agencies. The proposal was originally developed during the Bush administration and included a number of exemptions for those agencies strongly opposed to a ban, in an apparent effort to gain support during the

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final days of the Bush presidency. Those exemptions have reportedly been dropped, and HHS officials believe that the Clinton administration will be receptive to the proposal if it is framed as a measure to protect the health of federal workers and the public.

The proposal will reportedly be presented to the Office of Management and Budget within the next several months. Antismoking advocates are evidently hoping that President Clinton will sign the order this year. A government-wide smoking ban is reportedly still opposed by such agencies as the Veterans Administration and the Central Intelligence Agency. *See* BNA *Daily Labor Report*, June 10, 1993.

VETERANS ADMINISTRATION (VA)

[4] Costs Estimated for VA Compliance with Smoking Standards

According to a press report, the General Accounting Office has estimated that it will cost the VA $24 million to equip its facilities with separately-ventilated smoking areas or outside smoking shelters as mandated in 1992 by Congress. Only 44 VA medical facilities out of 159 apparently have smoking areas that meet the new law's standards. Officials at 132 of the facilities reportedly said that they would need more than one smoking area to accommodate their patients. Thus, some 998 smoking areas, at a cost of $40,000 to $225,000 each, would be required according to the GAO. *See The Kansas City Star*, June 13, 1993.

103D CONGRESS

[5] Traficant Bill Approved by House Committee

Following amendment, the "Ban on Smoking in Federal Buildings Act" (PRO-FEDS) (H.R. 881), introduced by Representative James Traficant (D-Ohio), was approved by the House Public Works and Transportation Committee. The bill now goes before the full House. PRO-FEDS, as originally drafted, would have prohibited smoking in all buildings owned or leased by the federal government.

Traficant offered two amendments which would (i) permit the heads of federal agencies to designate certain areas of their buildings as smoking areas, if separately ventilated and (ii) exempt all Veterans Affairs health care facilities and military installations. These amendments, and an amendment that would require the head of the General Services Administration (GSA) to report on new methods of ventilation two years after the law goes into effect, were approved and added to the measure.

Legislators supporting the measure apparently cited the EPA Risk Assessment on ETS to argue that Congress has an obligation to protect the federal workforce. Opponents reportedly questioned EPA's conclusions and said the bill would discriminate against smokers. *See Daily Report for Executives*, June 18, 1993.

Representative James Clyburn (D-S.C.), stating that "a more thorough record" was required to make a decision on the bill, offered an amendment that would have required the submission of a report by the General Accounting Office on (i) the number of ETS-related workers' compensation claims; (ii) the liability the federal government may have for claims based on other airborne substances; (iii) the cost to government of employees leaving work for smoking breaks; and (iv) the possibility of using other methods for reducing all levels of indoor air pollutants. This amendment was defeated by a vote of 8-3 during the bill's markup in subcommittee.

According to a press report, a Traficant spokesperson is predicting that, in spite of the overwhelming majority of nonsmokers in Congress, there will be a "fight on the floor and a huge fight in the Senate — it may take a few years." *See States News Service*, June 16, 1993.

[6] Capitol Architect To Announce Smoking Plan

The Capitol Architect, who was charged by the House Office Building Commission with designing smoking accommodation areas on the House side of the Capitol, was expected to announce a plan in mid-June 1993. *See* issue 47 of this Report, May 14, 1993. According to an Architect spokesperson, the original plan would have permitted smoking in designated restrooms, but complaints about such a policy have led the Architect's office to consider designating smoking at the ends of office building hallways or in House garages.

Smoking has been banned in all public areas of House buildings since May 7, pending approval of the Architect's plan. While smoking is permitted in individual offices at the discretion of House members and committee chairs, elsewhere smokers have appar-

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ently been forced to smoke out of doors or on the Senate side of the Capitol where there are reportedly no plans to limit smoking.

Roll Call reportedly conducted a survey to determine how many members of Congress smoke and how many individual offices have adopted smoking bans or restrictions. At the present time, only 37 members of the House and six members of the Senate are smokers. Evidently, 76 members of Congress were smoking tobacco products four years ago. Although about one-fourth of all Americans smoke cigarettes, the number of Representatives and Senators who do so comprises less than four percent of Congress.

According to the survey, 298 of the 535 Congressional offices completely ban smoking, up from 132 with such prohibitions in 1989. Many of the remaining offices impose tough smoking restrictions. Only 26 offices, 21 in the House and five in the Senate, permit smoking without restriction. *See Roll Call*, June 14, 1993.

[7] House Preparing Legislation to Improve Risk Assessments

Bipartisan House staff are reportedly in the process of drafting legislation that would improve risk assessments by requiring regulatory agencies to disclose the assumptions they use and the techniques they employ in developing the assessments. According to *Inside EPA*'s unnamed sources, the measure is likely to be introduced later this year, and it parallels a requirement imposed last year upon EPA scientists by then-Deputy Administrator Henry Habicht to promote credible science.

The draft language of this "Risk Communication Act" is apparently being circulated now within the House and among professional groups. Its purpose is to ensure that agency officials are alerted to the subjective assumptions about risks that are being made by staff who prepare regulatory options. A congressional source has reportedly said that the legislation differs significantly from a risk assessment measure that was added to the Senate bill that would elevate the EPA to cabinet level status (S. 171). *See* issue 47 of this Report, May 14, 1993. Unlike the Senate bill, which would require federal agencies to conduct risk assessments, the House legislation would simply require federal agencies to release information about the ways in which risks are estimated.

It is not known whether the bill will be introduced independently or whether it will be attached to the Cabinet bill or some other legislation. *See Inside EPA*, June 11, 1993.

White House

[8] Administration Seeks Smoking Bans on International Flights

According to a press report, the Clinton administration is negotiating with a number of governments to bring about a smoking ban on all international flights into and out of the United States. The negotiations are said to be necessary so that United States airlines are not put at an economic disadvantage. An agreement that is reportedly nearing completion involves the United States, Canada, Australia and New Zealand. Air Canada is the only carrier at present that bans smoking on all flights, domestic and international. *See The New York Times*, June 13, 1993.

[9] Health Task Force Member Anticipates Federal Workplace Smoking Ban

According to Michael Samuelson, a member of President Clinton's task force on health care reform, the EPA, acting through OSHA, will ban smoking in the workplace within two years. Samuelson apparently made his prediction during a seminar sponsored recently for Northeast Mississippi industry representatives by a local medical center and a national pharmaceutical company. He reportedly advised seminar participants to ban smoking in the workplace in order to avoid lawsuits. *See Associated Press*, June 16, 1993.

U.S. Occupational Safety and Health Administration (OSHA)

[10] Labor Secretary Advocates Speedier Rulemaking

Labor Secretary Robert Reich, testifying before the House Education and Labor Committee on the pending OSHA reform legislation (H.R. 1280), was quoted as saying, "I do not believe that the agency should be required to perform detailed and time-consuming analyses of issues of which there is no reasonable basis for dispute, and which in fact are not actively disputed by parties to the rule-making."

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Reich's comments have led labor lawyers to conclude that the spirit of regulatory reform is alive again at the agency. Reich testified during a hearing conducted by the committee on April 28, 1993. *See The National Law Journal*, June 7, 1993.

Meanwhile, Pete Lunnie, industry's chief lobbyist on OSHA reform legislation, reportedly said on June 10 that he doubted the bill would become law in its present form during the 103d Congress. He says he believes the measure can be beaten in the Senate. According to Lunnie, the best approach to OSHA Reform would be to examine the current OSH Act, determine where the problems lie and then devise improvements. Lunnie, speaking before a group of industry safety officials, said he plans to meet with Reich on July 1 to outline the industry position on OSHA reform. *See Daily Report for Executives*, June 11, 1993.

U.S. Postal Service

[11] Post Office Smoking Ban Challenged

Following the Postal Service's smoking ban ordered to begin June 13, 1993, the American Postal Workers Union has reportedly lodged a grievance. The ban is also being challenged by the National Association of Letter Carriers and the National Postal Mail Handlers Union. An American Postal Workers Union spokesperson stated, "It's just not fair to those who do smoke," and believed that there were less extreme ways to handle the situation. See *The Boston Globe*, June 15, 1993. The postal service ban was instituted as a result of the EPA Risk Assessment on ETS, according to the postmaster general. *See* issue 49 of this Report, June 11, 1993.

U.S. Consumer Product Safety Commission (CPSC)

[12] Joint Project Initiated to Study HVAC Systems and IAQ

The CPSC and the National Institute of Standards and Technology have reportedly entered an interagency agreement which establishes a two-phase study of residential HVAC systems to determine their potential to reduce certain indoor air constituents. Computer modeling will apparently be used to see if existing HVAC technology can reduce selected constituents to defined low levels. Constituents subject to the study will be nitrogen dioxide, carbon monoxide, particulates and biologicals. *See Product Safety & Liability Reporter*, May 28, 1993.

State and Local Governments

[13] ETS-Related State and Local Legislation

•California

According to news reports, the Senate recently voted 23-3 to adopt a resolution already passed by the Assembly that prohibits smoking in buildings owned, leased or occupied by the Legislature, including the Capitol, floors of both houses, hearings rooms, offices, hallways, restaurants and bathrooms. *See* A.C.R. 27, Regular Session (1993-94) and *United Press International*, June 11, 1993.

According to a Price Waterhouse study sponsored by southern California hotel and restaurant associations, a state no-smoking law could jeopardize 82,000 jobs and cost California more than $3.5 billion. The study was a survey of hotel and restaurant managers about their estimates of what they would lose if smokers couldn't smoke in their establishments. Of 74 managers, 54 percent estimated a loss in business and 45 percent saw no change. One manager said business would improve. The study reported that a 100 percent smoking ban would cause an average loss of 7 percent in restaurant sales and an 18 percent loss in hotel and motel receipts, putting many people out of business. *See Morning Newsbriefs*, June 7, 1993.

•Local Governments in California

On June 23, 1993, by a vote of 8 to 6, the Los Angeles City Council approved a bill that would prohibit smoking in virtually all of the city's 7,000 restaurants, excluding dance clubs, bars, rented banquet rooms and outdoor eating areas. According to a spokesman for Mayor Tom Bradley, the chances of the bill's approval by the Mayor are good, but no final decision has been made whether he will sign or veto it before he retires from office next week. The Mayor could leave office without taking any action, in which case Mayor-elect Richard Riordan would have three days to act. Riordan allegedly supports a smoking ban in restaurants.

The bill, even if it does become law, may be short-lived if the state Legislature passes a bill currently under

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consideration in the Senate that would replace local smoking ordinances enacted after April 1 with a single standard (A.B. 996). *See The New York Times* and *USA Today*, June 24, 1993.

•Connecticut

On June 7, 1993, the Senate reportedly approved 29-7 a bill that restricts smoking to designated areas in the State Capitol. The bill also prohibits smoking in all public elementary and high schools and in any place where the public conducts business. Governor Lowell P. Weicker, Jr. (ACP) has indicated he will sign the bill if there is "nothing untoward in it," reports a spokeswoman. The bill's author had introduced antismoking bills previously without success; however, the turning point reportedly came this year with the release of the EPA Risk Assessment on ETS and its claim that an alleged 3,000 nonsmokers die each year from exposure to ETS. *See The Hartford Courant*, June 8, 1993, and May 25, 1993, and *The New York Times*, June 6, 1993.

•Louisiana

Governor Edwin Edwards (D) has reportedly signed into law a bill that prevents municipal and parish governments from enacting legislation more restrictive than the state's on smoking in public buildings. The law requires state, parish and municipal governments to designate a smoking room or area in government buildings. Local antismoking laws enacted before September 1, 1993, will not be affected. *See The Associated Press*, June 9, 1993, and *The Times-Picayune*, June 16, 1993.

•Local Governments in Maryland

The Howard County Executive vetoed a bill that would have prohibited smoking in most public places, including office common areas, child care centers, beauty shops and stores, according to news reports. Smoking in restaurants would have been eliminated by 1996. The county executive was reported to say that he sympathized with the intent of the bill, but a ban might put restaurants at an economic disadvantage with competitors in neighboring counties. He also allegedly objected to the bill's provisions exempting bars and making it illegal for employers to fire or refuse to hire a person who smokes outside the workplace. *See The Washington Post*, June 19, 1993, and *The Washington Times*, June 20, 1993.

In Anne Arundel County, the County Council enacted a smoking prohibition that will affect banks, classrooms, auditoriums, health care facilities, public meeting rooms, museums, libraries, restrooms, and other areas. *See The Baltimore Sun*, June 8, 1993.

•Michigan

The Michigan Department of Public Health, in a report released on June 2, has apparently found a high level of voluntary compliance with the state's Clean Indoor Air Act, which restricts smoking in public places and government workplaces. According to the report, the department has received more than 3,000 calls for information since the statute took effect in 1987. Formal complaints were evidently filed against facilities covered by the law in 163 cases, and of those complaints 93 percent were resolved.

The Department has apparently recommended amending the law to place restrictions or complete bans on smoking in additional locations, including private workplaces and restaurants. The report indicates that the most common problems under the current law involve smoking in nondesignated areas, designation of smoking in inappropriate areas, lack of adequate ventilation and failure to adequately consider those who are purportedly hypersensitive to ETS. *See Toxic Chemicals Litigation Report*, June 10, 1993.

•New Hampshire

Town councilors of Bedford, New Hampshire, have reportedly voted 5-2 to defy the state's Indoor Smoking Act which calls, among other matters, for segregated smoking areas in publicly owned buildings. Under the Act, physical barriers must separate smokers from nonsmokers, and designated smoking areas should be constructed near exhaust vents. Persons in charge of public buildings who violate the Act face fines of up to $100. Bedford officials reportedly said that they are "tired of government telling us what to do and legislating common sense and morality," and that they are making "a statement." They call the law an "unfunded mandate" which requires that a community spend money without the state providing the funds. *See Boston Globe*, June 15, 1993.

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[14] *Blanchard*: Hearing on Venue Motions to be Held on July 1

The court will hear argument on defendants' motions to transfer venue and motions to strike on July 1, 1993.

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In broad terms, the motions contend that the current venue of Galveston County, Texas, is improper because (i) plaintiffs' causes of action did not accrue there; (ii) that the claims asserted on behalf of the various plaintiffs did not arise out of the same transactions or occurrences; (iii) that plaintiffs did not seek leave of the court before filing their supplemental and amended petitions, that added new parties to the case; and (iv) that the petitions are improper attempts at forum-shopping.

Three of the 14 plaintiffs in this case presently allege injury from exposure to ETS. Raye Blanchard and Tamara Reed, mother and daughter, both claim damages for unspecified "illness and disease" allegedly resulting from exposure to the ETS from cigarettes smoked by Raye's deceased husband, Thomas, and by Raye herself, who claims she smoked "for about ten years." The third ETS plaintiff, Pamela Kastrin Stephens, claims unspecified "lung and respiratory diseases" allegedly caused by exposure to the ETS from the cigarettes smoked by her deceased father. The named defendants are purported to be the six major U.S. cigarette manufacturers, The Tobacco Institute, the Council for Tobacco Research, and a number of wholesalers and retailers. *Blanchard, et al., v. R.J. Reynolds Tobacco Company, et al.* (District Court, Galveston County, Texas) (filed July 31, 1992).

[15] *Broin*: Rehearing Petition Filed; Depositions of Executives Stayed

On June 11, 1993, defendants:

- Filed a motion for rehearing and for certification with the Third District Court of Appeal from that court's May 27 ruling denying defendants' petition for writ of certiorari;
- Sought from the trial court and were denied a motion for protective order regarding depositions noticed of senior tobacco company executives that were to be taken from June 14-22; and
- Sought from the Court of Appeal and received an emergency motion for a stay of the depositions of the company executives.

The stay will remain in effect pending further order of the appellate court. Plaintiffs filed a motion to vacate the stay on June 14, but the Court of Appeal denied it on June 18 before defendants submitted their response. In the trial court order that preceded the stay from the appeals court, Judge Robert Kaye had directed that the depositions go forward on June 14 despite the pendency of the motion for rehearing.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The attendants purport to represent a class of approximately 60,000 other attendants.

Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al., v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[16] *Butler*: Trial Date Set for September 5, 1994

On June 8, 1993, Judge Gibbs entered a scheduling order setting a trial date of September 5, 1994. The scheduling order directs plaintiffs to designate their expert witnesses on September 24, 1993; for defendants to designate their experts on October 22, 1993; for all motions, except dispositive motions and evidentiary *in limine* motions, to be filed on December 31, 1993; for discovery to be completed by January 30, 1994; for all dispositive motions to be filed by May 27, 1994; and for the final pre-trial conference to be held on August 13, 1994.

Plaintiffs contend that Burl Butler, a barber in Laurel, Mississippi, developed lung cancer as a result of his occupational exposure to environmental tobacco smoke. The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

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